STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING, Complainant,

vs.

BLACKHAWK TECHNICAL COLLEGE, Respondent.

Case 63
No. 54966
MP-3279

Decision No. 29066-C

(Complaint initially filed on 3-3-97)

Appearances

Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511, appearing on his own behalf.

Mr. Peter Albrecht, Godfrey & Kahn, Attorneys at Law, 131 West Wilson Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of Blackhawk Technical College.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PRE-HEARING MOTION TO DISMISS

On March 3, 1997, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the above-named Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats., of the Municipal Employment Relations Act (MERA). On May 19, 1997, the WERC issued an order substituting the undersigned Marshall L. Gratz, a member of its staff, as Examiner in the matter.

As a result of the various pre-hearing developments detailed in the memorandum accompanying this decision, disputes concerning the following issues have ripened for decision prior to the conduct of a hearing in this matter: (1) whether the Examiner will exercise the Commission's jurisdiction to resolve the Sec. 111.70(3)(a)5, Stats., violation of agreement allegation; (2) whether Complainant shall be permitted to amend the complaint to add a separate claim that Respondent violated Secs. 111.70(3)(a)1 and 3, Stats., as regards criticisms of Complainant in an evaluation issued to Complainant on June 11, 1996 and non-criticisms of a fellow employe in her evaluation; (3) if that amendment is allowed, whether the added allegations are time-barred by the one-year statute of limitations; and (4) whether the remaining alleged independent violation of Sec. 111.70(3)(a)1, Stats., regarding disparate disciplinary treatment on account of MERA-protected activities is time-barred by the one year statute of limitations.

The Examiner received the last of the parties' written statements of the position concerning various of those disputed matters on October 3, 1997.

Based on the pleadings and arguments submitted and the record developed to date, the Examiner issues the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. The Complainant, Mark J. Benzing, is a person who resides at 2022 Dewey Avenue, Beloit, Wisconsin.

2. The Respondent, Blackhawk Technical College (also referred to herein as the District), is a municipal employer with offices at 6004 Prairie Road, County Trunk G, Janesville, Wisconsin.

3. On March 3, 1997, Complainant filed with the WERC a complaint alleging that the Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats., concerning allegedly disparate discipline of custodial employes as compared to maintenance employes allegedly primarily because custodial employes (including Complainant) had filed grievances and complaints against their supervisor and Respondent.

4. As subsequently clarified and amended by Complainant, the complaint alleges facts which, on their face, establish that Complainant had reason to know of the allegedly disparate discipline and of the custodial employes' grievance and complaint activities "on or about January of 1996," and hence more than one year prior to Complainant's initial filing of the instant complaint.

5. As subsequently clarified and amended by Complainant, the complaint also alleges facts which, on their face, establish:

a. that Complainant filed a grievance on or about March 4, 1996 alleging that Respondent's disparate discipline of custodial as compared to maintenance employes violated various provisions of the collective bargaining agreement between Respondent and Complainant's exclusive collective bargaining representative, the Blackhawk Technical College/Paraprofessional Technical Council (BTC/PTC);

b. that the BTC/PTC Executive Council informed Respondent, Complainant and others in writing on July 19, 1996, among other things, that BTC/PTC would not be pursuing Grievance 96-02 to arbitration; and

c. that Complainant does not claim either that BTC/PTC failed to fairly represent him regarding that grievance or that the District prevented the grievance from being arbitrated.

6. On July 8, 1997, the Examiner received from Complainant a motion to amend the above complaint to include claims that Respondent committed prohibited practices within the meaning of Secs. "111.70(3)1 and 3", Stats., [which the Examiner interprets to have been intended to be Secs. 111.70(3)(a)1 and 3, Stats.] based on the following alleged facts:

a. that on July 11, 1996, Respondent issued Complainant an evaluation containing untrue statements that Complainant "spoke obscene when I referred to [Respondent's Facilities Manager/Supervisor Jeff Amundson] and other administrative staff members. And also that I become argumentative and upset often";

b. that Respondent issued that evaluation "Primarily to retaliate and harass me for prior complaints, and grievances that I filed against the respondent, in which . . . Amundson, was one of the ones whose actions were complained of"; and,

c. "that another member of the same department . . . has been known to use obscene and vulgar language when speaking to . . . Amundson, and never received any statement mentioning this fact on her evaluation/assessment."

7. The evaluation referred to in the motion to amend was, in fact, issued to and received by Complainant on June 11, 1996, not July 11, 1996.

8. As of June 11, 1996, Complainant had reason to know both the contents of the evaluation which he received on that date, and the nature of the grievances and complaints that he had filed prior to that date.

9. The motion to amend was filed more than one year from the date of the prohibited

practices alleged in the instant complaint that were based on the facts noted in Finding of Fact 6.a. and 6.b., above.

CONCLUSIONS OF LAW

1. The Examiner declines to exercise the Commission's jurisdiction under Secs. 111.07 and 111.70(4)(a), Stats., to adjudicate Complainant's allegation that Respondent violated the terms of a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., because grievance 96-02 regarding the same subject matter was processed under the agreement grievance procedure and ultimately not pursued to grievance arbitration by BTC/PTC, and because Complainant does not claim either that BTC/PTC failed to fairly represent him regarding that grievance or that the District prevented that grievance from being arbitrated.

2. In light of Conclusions of Law 4 and 5, below, Respondent has not shown that the Examiner's granting Complainant's July 8, 1997, motion to amend would prejudice the Respondent's rights in any way.

3. Complainant is entitled under ch. ERC 12.05(a), WIS. ADM. CODE to amend the complaint to include the separate claim concerning criticisms and non-criticisms in evaluations.

4. Viewing the allegations contained in Complainant's July 8, 1997, motion to amend in the light most favorable to Complainant, the prohibited practices alleged therein that are based on the facts noted in Finding of Fact 6.a. and 6.b., above, are time-barred by the one-year statute of limitations contained in Sec. 111.07(14), Stats.

5. Viewing the allegations contained in Complainant's July 8, 1997, motion to amend in the light most favorable to Complainant, the allegations referred to in Finding of Fact 6.c., above, do not, in and of themselves, constitute a prohibited practice within the meaning of Sec. 111.70(3), Stats.

6. The remaining complaint allegation, that Respondent committed independent violation of Sec. 111.70(3)(a)1, Stats., regarding disparate disciplinary treatment on account of MERA-protected activities, is time-barred by the Sec. 111.07(14), Stats., statute of limitations.

7. Under no interpretation of the facts alleged in the instant complaint as clarified and amended would the Complainant be entitled to relief from WERC.

ORDER

1. Complainant's July 8, 1997, motion to amend the complaint is granted.

2. Respondent's motion to dismiss the amended complaint in its entirety is granted.

3. The Case 63 Complaint filed on March 3, 1997, as subsequently clarified and amended, is dismissed.

Dated at Shorewood, Wisconsin, this 16th day of December, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

BLACKHAWK TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PRE-HEARING MOTION TO DISMISS

PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

The Case 63 complaint was filed on 3-3-96. In it, Complainant Benzing alleged that Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats., based on the following alleged facts:

> In November of 1996, several members of the custodial support staff at central campus, during a meeting with the Facilities Manager/Supervisor, Mr. J. Amundson, and Mr. B. Borremans; Vice President Administrative Services/Student Services, at the College, complained, that on numerous occasions, members of the maintenance support staff at the central campus had been seen playing computer games during their working hours (not during scheduled break times), and some occasions with their supervisor . . . Amundson. The custodians were assured by the Vice President [Borremans], that it would stop. At a following meeting the custodians questioned the action taken against the maintenance staff for the above . . . infraction, and were informed that the maintenance staff were give a verbal warning, as discipline action. The custodians again complained about the level of discipline the maintenance staff received; without any adjustment to the level of discipline the maintenance staff received, a formal grievance was filed on March 4, 1996; requesting a more adequate and appropriate discipline action, taken against the maintenance staff, as a relief sought, and complaining that articles two, sections four, nine and eleven; article nine and article 123, sections 1 and 2 were violated. Also, the purpose of the collective bargaining agreement, page one of the CBA. After appealing to all the steps of the grievance procedure, without any of our demands for relief met. We appealed to the Local Union, to take our grievance to arbitration, since we believed it had plenty of merit, because personnel in the same department, who were not maintenance but were custodial staff, received alot harsher discipline action, for an event that happened only once; while the maintenance staff members were allowed numerous infractions (knowing violating work rules) of the same wrongdoing, and received a lesser disciplinary action, by the department

supervisor and without any redress from the personnel administrator and other administrators at the College; in retaliation to past practice and consistency factors. The date of the aforementioned appeal to the Local Union, was around July 8, 1996. And the date that the aforementioned grievance was decided on by the (Board of Directors of the College decided to waive a hearing on the grievance) Board of Directors of the College was June 5, 1996. The Local Union, on July 8, 1996 sent a letter to the college's personnel administrator, Mr. David Esler, which addressed the appropriateness, favoritism and inequitable discipline, also rules being implemented unfairly and improperly. Another allegation of this complaint is that shortly after this letter was sent to the personnel administrator and a copy sent to the District Director of the College; the maintenance personnel and the Facilities Manager/Supervisor of the department totally re-built their adjoining offices and designed them so you can't see what they're doing on the computer until they see you; and also the doors stay closed and locked, whether they are there or not. And also, there is no clear account of the discipline (a verbal warning) imposed on the maintenance staff; some believe they were told that if they were to play computer games outside their break times, not to be seen, and another factor is that the personnel administrator informed the Complainant and the Local Union Chief Steward, during a meeting (step four grievance meeting) with the District Director, that he had confirmed and positive eye witnesses that informed him that they had witnessed the Facilities Manager/Supervisor and maintenance staff playing computer games during work hours for at least a year. The date of the aforementioned meeting was May 1, 1996.

On July 8, 1997, the Examiner received from Complainant a motion to amend the above complaint to include the following additional allegations:

> During the afternoon of July 11, 996 I was given evaluation/assessment from Facilities Manager/Supervisor, in which allegations were made by the Supervisor, that I spoke obscene when I referred to him and other administrative staff members. And also that I become argumentative and upset often. Both allegations are untrue and were incorporated into my yearly evaluation/assessment; primarily to retaliate and harass me for prior complaints, and grievances that I filed against the respondent, in which the Facilities Manager/Dept. Supervisor Jeff Amundson, was one of the ones whose actions were complained of.
>
> The Sections of the Statutes I believe have been violated are, 111.70(3)1 and 3, [sic] of the Wisconsin Statutes.

Also, I want to add the fact/allegation, that another member of the same department that the complainant is in has been know to use obscene and vulgar language when speaking to the Facilities Manager/Supervisor, Jeff Amundson, and never received any statement mentioning this fact on her evaluation/assessment.

The Examiner then wrote the parties on 7-8-97, in pertinent part, as follows:

> This is to confirm the nature and results of my telephone conversations with both of you on July 7 and with Mr. Benzing on July 8. . . .
>
> First, we have reserved Thursday, July 10, 1997, at 11:30 AM for a telephone pre-hearing conference in this matter. . . .
>
> Third, today I have received Mr. Benzing's motion to amend the complaint in the above matter. I am faxing a copy of that motion with this letter to Mr. Albrecht so that he has it in advance of our telephone conference on Thursday.
>
> Fourth and finally, after reading Mr. Benzing's motion to amend, I telephoned him this morning. In that conversation, I noted that the subject matter of his proposed amendment involves a matter allegedly occurring on July 11, 1996. I informed Mr. Benzing that I would not be ruling on the motion until our Thursday conference call at the earliest. For that reason, I told Mr. Benzing that if he intends to pursue the subject matter of the amendment as a separate complaint if the motion to amend is denied, he would need to file it promptly to meet the applicable one year statute of limitations. Mr. Benzing replied that he would consider the matter and would likely be filing the amendment as a separate complaint.
>
> I look forward to talking with you both on Thursday.

Complainant ultimately filed the amendment allegations as a separate complaint on 7-11-97. That complaint was received in the WERC Madison office on 8-11-97, docketed as Case 67, and assigned to the instant Examiner.

The Examiner next wrote the parties on 7-10-97, summarizing the results of the telephone conference he conducted with the parties, in pertinent part, as follows:

> This letter is intended to summarize the results of the telephone pre-hearing conference we had concerning the above matter on July 10, 1997, from 11:30 AM to approximately 12:35 PM. This letter will be treated as a

part of the official record of the case. The results of the conference are set forth in items 1-7, below. . . . If either party thinks the summary needs to be added to or corrected, please promptly so communicate to the Examiner with a copy to the other party.

1. Mr. Benzing's July 8 motion to amend the complaint. Mr. Benzing filed a motion to amend the complaint to add allegations regarding an evaluation allegedly issued to him on July 11, 1996. That motion was dated June 30 but received by the Examiner on July 8, 1997 because of delays associated with its being sent by certified mail requiring the Examiner to be present to complete delivery. The Examiner forwarded a copy of that motion to Mr. Albrecht by fax with an accompanying letter on July 8.

During the conference, Mr. Albrecht stated that the District opposes the motion to amend on the grounds that the additional allegations are unrelated to the allegations contained in the March 3 complaint. The Examiner, while noting that the Commission's rules permit liberal complaint amendment absent a showing of prejudice, suggested that, assuming the separate complaint is received in time to satisfy the statute of limitations, the motion to amend be considered withdrawn in favor of processing its allegations as a separate complaint. Mr. Benzing agreed with the approach suggested by the Examiner and Mr. Albrecht expressed no objection to it.

Accordingly, if the separate complaint is filed on or before July 12, 1997, the Examiner will treat Mr. Benzing's July 8 motion to amend as being withdrawn by Mr. Benzing in favor of processing those allegations as a separate complaint. If for some reason the separate complaint is not filed by that date, the Examiner will promptly rule on the motion to amend.

2. Clarification of the date of the alleged meeting described in complaint paragraph 1 sentence 2. Following a detailed discussion, Mr. Benzing agreed with the Examiner that the second sentence of paragraph 1 should begin "In November of 1995 . . ." rather than "In November of 1996 . . ." so that it would refer to matters prior in time to the other subsequent events alleged to have occurred in 1996 but prior to November of that year.

3. Clarification of the time and substance of the "following meeting" referred to beginning in the 11th line of complaint paragraph 1. The Examiner asked when Mr. Benzing alleged that that meeting took place. Mr. Benzing responded that it took place in or about January of 1996. Mr. Benzing stated that he intends to further amend the complaint regarding the nature of District management's response at that meeting so that the

complaint will allege that management responded that it knew of no eyewitnesses to the maintenance employes playing computer games outside of their breaks but that management was nonetheless verbally cautioning them not to do so.

5. Mr. Benzing's allegation that the District violated Sec. 111.70(3)(a)1, Stats. Following the discussion summarized above, Mr. Benzing stated that he had intended his Sec. 111.70(3)(a)1, Stats., allegation to allege a violation independent of the collective bargaining agreement. In that regard, Mr. Benzing stated that he intended to amend the complaint to more specifically allege that custodial employes had variously engaged in grievance processing and other activities protected by Sec. 111.70(2), Stats.; that management personnel were aware of that conduct; that the District had issued written warnings and written reprimands to the custodial employes for various alleged disciplinary offenses; that the maintenance employes have not engaged in activities protected by Sec. 111.70(2), Stats., of the sort engaged in by the custodial employes; that the District responded less harshly to the maintenance employes' pattern of computer games misconduct than it had to the isolated instances of alleged misconduct by custodial employes, at least in part, because of the custodial employes' Sec. 111.70(2), Stats., activities.

Mr. Albrecht responded that, in light of the Examiner's reference earlier in the conference to the liberal nature of the Commission's rules regarding complaint amendment, the District did not object to the contemplated amendments that Mr. Benzing had described but that the District requested that Mr. Benzing be required to make those allegations more definite and certain regarding such matters as dates, persons involved and other pertinent details. Mr. Benzing agreed to provide those additional details in writing by August 4.

6. Schedule of further proceedings. . . .

7. Mr. Benzing's request for subpoenas. . . .

That concludes the Examiner's summary of the results of the telephone conference.

. . .

On 7-16-97, the Examiner wrote the parties summarizing further procedural developments, in pertinent part, as follows:

This is to confirm that Mr. Albrecht informed me by telephone today that the District considers the separate complaint filed by Mr. Benzing on July 11, 1997, concerning an evaluation allegedly issued to Mr. Benzing on July 11, 1996 to be untimely filed. Mr. Albrecht further stated that the District issued the evaluation involved on June 11, 1996, not July 11 as Mr. Benzing alleged.

Mr. Albrecht further stated that the District continues to oppose Mr. Benzing's motion to amend the complaint in Case 63 which is now before me, on the grounds that he mentioned during our conference call: that allowing the amendment would prejudice the District because it would allow Mr. Benzing to pursue a complaint of which the District was not given notice until more than one year after the acts or occurrences constituting the alleged violation.

I have directed Mr. Albrecht to put the District's position opposing the motion to amend in writing as soon as possible, so that Mr. Benzing will have an opportunity to respond in writing to the statement and so that I will have an opportunity to then rule on the motion to amend sufficiently in advance of the August 22 date we have established for the District to answer the complaint in this matter.

. . .

On 8-5-97, Complainant filed the following "Amendment of the original complaint, requested by the Examiner . . .":

In November of 1995 several members of the custodial support staff at the College's central campus, during a meeting with Vice President of Administrative Services, Bob Borremans and the College's Custodial and Maintenance Departments Supervisor, Jeff Amundson, complained that on numerous occasions during the course of several years or more, members

of the custodial support staff had witnessed members of the maintenance support staff, playing computer games during regular scheduled work hours and not during their scheduled break times. And on some occasions with . . Amundson, sitting in the next room, and also playing alongside them.

The custodians who had complained of the above were assured by [Borremans] that the practice would not continue. At a following meeting, on or around January 1996, several custodians asked what type of discipline was administered to the maintenance personnel involved in the violation contract/playing computer games during scheduled work hours. The custodians were informed that the maintenance personnel were given a verbal

warning as discipline.

The custodians complained that the level of discipline administered was much less than the infraction called for, and requested that the College administer [the] correct amount of discipline. When the Complainant became aware that the correct amount of discipline would not be administered to the maintenance personnel, he and several other custodians initiated a grievance.

All of the custodians who initiated the grievance dropped the grievance in its first steps, except the Complainant. The reasons they gave the Complainant was that they were afraid of retaliatory action taken against them.

A formal grievance was filed complaining of the College's decision, not to administer a harsher discipline to the maintenance personnel, on or around March Fourth. During a step four grievance meeting the District Director complained to the Complainant/Grievant that he could not justify/administer any harsher discipline against the maintenance personnel unless the grievant/complainant could produce eye-witnesses to the allegations. Immediately after the District Director of the College made the above statement, the College's personnel director, who was in attendance at the meeting, spoke up and said to the District Director that he knew of several neutral eye-witnesses that he spoke with and verified witnesses the infraction that the custodians/grievant wanted a harsher discipline action administered because of.

Regardless of the statement made by the Personnel Administrator, David Esler, the College never administered a harsher discipline against the members of the maintenance support staff for playing computer games

during work hours on a yearly basis. Even though the Complainant [and] two other custodians were given harsher discipline for a one time only infractions. Jesus Barbary and Charles Stokes are the other two custodians.

Also, the Complainant and Jesus Barbary, and on some occasions Charles Stokes, had filed a number of grievances complaining and attempting to better the custodians' working conditions at the College, while the members of the maintenance staff has filed only one grievance, and the basis behind the grievance was complaining of the College's custodians. The dates of the grievances filed by the above-named custodians are in the attached exhibit.

Attached to Complainant's amendment document was a detailed two-page listing of "Grievance Information For BTC/FTC Employes," showing the grievance number, grievant's name, date, description and status of grievances filed from January 1, 1993

through June 5, 1995.

On 8-11-97, the Examiner served the parties with separate notices of hearing in Cases 63 and 67, setting the hearings in those matters for the same dates, September 23 and (if necessary) 24, 1997, and calling upon the Respondent to file answers in each case.

On 8-15-97, the District filed a motion to dismiss the separate Case 67 complaint on the grounds that the evaluation involved had been issued to Complainant on June 11, 1996, rather than on July 11, 1996.

Because the District had moved to dismiss the separate Case 67 complaint on timeliness grounds, it became necessary for the Examiner to address Complainant's 7-8-97 motion to amend Case 63, above. Accordingly, on 8-17-97, the Examiner wrote the parties, in pertinent part, as follows:

> Before ruling on . . . Mr. Benzing's motion to amend the Case 63 complaint to include contentions relating to Mr. Benzing's 1996 performance evaluation, I want to give Mr. Benzing an opportunity to state his position on those matters.
>
> Specifically, I would like to know Mr. Benzing's answers to the following questions:
>
> 1. Does Mr. Benzing dispute Mr. Albrecht's contention that the performance evaluation was issued to Mr. Benzing on June 11, 1996?

> 2. If Mr. Benzing does not dispute that the performance evaluation was issued to him on June 11, 1996, then
>
> . . .
>
> b. is there any reason why Mr. Benzing's motion to amend the Case 63 complaint to include allegations about that evaluation should not be denied on the grounds that it was filed more than one year after the performance assessment was issued to him. (Mr. Benzing's motion to amend the Case 63 complaint to include references to the performance assessment, was filed on July 8, 1997, the date when I received that motion in the mail from Mr. Benzing.)
>
> . . .
>
> On 8-21-97, the District filed a motion to dismiss the Case 63 complaint on the following bases:
>
> 1. An action under Chapter 111 of the Wisconsin Statutes must be filed

within one year from the date of the act or acts giving rise to the alleged action. Sec. 111.07(14) Wis. Stats.

2. The instant Complaint initially was filed on March 3, 1997. The Complaint later was amended on or about July 31, 1997. For purposes of the one year Statute of Limitations, however, events occurring more than one year before the date the Complaint initially was filed are time barred; i.e., events occurring before March 3, 1996 would be time barred.

3. The Complaint alleges, in essence, that the Respondent allowed members of the maintenance staff to play computer games while not allowing members of the custodial staff to do the same. Further, the Complaint alleges that members of the custodial staff were disciplined more harshly than members of the maintenance staff for playing said computer games. As the amended Complaint clarifies, the facts giving rise to the Complaint arose in November of 1995. (Amended Complaint at paragraph 1; see also amended grievance attached as Exhibit "A" indicating that the facts underlying the Complaint became known on November 9, 1995.)

4. Because the Complainant had actual knowledge of the facts underlying the instant action as of November 9, 1995, the instant Complaint, to be timely, should have been filed on or before November 9, 1996. It was not. Instead, it was filed on March 3, 1997--almost five months past the Statute of Limitations.

WHEREFORE, based on the foregoing, the Respondent, Black Hawk Technical College, respectfully requests that the above captioned Complaint be dismissed because it was not filed within the Statute of Limitations.

Attached to the District's motion to dismiss was what purports to be an "Amended" grievance form signed by the grievant, dated March 23 and 25, 1996, filed on behalf of "Mark Benzing, and members who wish to remain anonymous," filed with the Human Resource Administrator at grievance step number three, specifying the "Date facts became known:" as "November 9, 1995," specifying the contract sections allegedly violated as "Article 2, sec. 9 and sec. 11, article 9 and the purpose of the CBA, and containing the following "Issue Statement":

For a year or more the members of the maintenance department would play computer card games, during work hours. A violation of article 12, sec. 1 and 2. Several members of the cust. dept. complained to the Vice President of Adm. Services, and the Facilities Manager/Supervisor was told while we the Complainants were present, to stop this practice because he was allowing it to happen and was even playing the aforementioned games with the

maintenance staff members. The maintenance staff members were given a verbal warning. Some members of the cust. dept. believe this was not a fair amount of discipline administered to maint.

As Relief sought, that grievance specifies "A written warning imposed on the members of the maint. staff or an investigation by the College into the matter with the results submitted to the proper Union authorities."

On 8-21-97, the Examiner then wrote the parties, in pertinent part, as follows:

> In yesterday's mail I received Mr. Albrecht's motion to dismiss the Case 63 complaint in its entirety on grounds that it was untimely filed. Accordingly, I am requesting that Mr. Benzing state his position in response to this additional motion to dismiss. . . .
>
> Specifically, I would like to know, in addition to answer to the questions listed in my August 17 letter, Mr. Benzing's answers to the following additional questions:
>
> . . .

> 3. Does Mr. Benzing dispute Mr. Albrecht's contention that the acts or prohibited practices alleged in the amended Case 63 complaint (relating to harsher discipline of custodians than of maintenance employes because of custodians' grievance processing activities) occurred prior to March 3 of 1996?
>
> 4. If Mr. Benzing does not dispute that, then is there any reason why the complaint in Case 63 (as it relates to harsher discipline of custodians than of maintenance employes because of custodians' grievance processing activities) should not be dismissed on the grounds that it was filed after the one year statute of limitations had run?
>
> . . .

On 8-22-97, Respondent filed its answer in Case 63.

On 9-5-97, in order to accommodate Complainant's request for an extension of time to respond to the Examiner's 8-17-97 and 8-21-97 inquiries, and to provide the District with a reasonable period of time to state its position in response, the Examiner postponed the hearing indefinitely pending the Examiner's ruling on the motion to dismiss in both Cases 63 and 67.

On 9-18-97, the Examiner received Complainant's response to the Examiner's abovenoted inquiries. In parts pertinent to Case 63, Complainant responded as follows:

> I will first reply to the questions you ask in your letter dated August 17, 1997.
>
> First question: I don't dispute the fact that the performance evaluation was issued to me, the Complainant, on June 11, 1996.
>
> Second question: (a) yes, because of the fact that the Complainant, was not aware of the allegations stated in his amended complaint, and in his amended complaint until November or December of 1996. Since the Complainant was informed personally by the custodial department's lead person (who has been known for past three or more years by most members of the custodial department to use vulgar language, mostly on a daily basis and in the presence of the department Supervisor/Facilities Manager, J. Amundson) that she didn't have any statements or complaints on her performance evaluation, regarding, her use of vulgar language.
>
> The above is also an answer to question two b.

> Third question: Yes the complainant disputes the allegation made in question three, since the Complainant made known the actual date of the alleged violation by the Respondent, during a phone conversation with the hearing examiner, and the Respondent's attorney (also see attached exhibits A and B.) Because of the attached exhibits, and the specific allegations, made in the original and amended complaint, the Complainant is led to believe that he has filed his complaint in a timely manner.
>
> . . .

Attached to Respondent's 9-18-97 response were two documents. The first purports to be a memorandum dated 7-19-96 from the BTC/PTC Executive Committee to Respondent's David Esler and with copies to Complainant and others, advising "that the BTC/PTC will not be pursuing Grievance 96-02 to Step 6, Arbitration [because] the BTC/PTC recognizes that disciplining employes is a management, not a union, responsibility," and further stating BTC/PTC's and Grievant Benzing's concerns related to "inequitable discipline." The second document purports to be Complainant's April 12, 1996 step four appeal of the abovenoted step three grievance form dated 3-23 and 3-25-97. That document bears Complainant's signature, asserts that the "Date [the] facts became known" was "November, 1995," and contains the following:

> Issue statement: In October of 1995, members of the Custodial staff made a formal complaint with the Vice President of Adm. Services with the College's Facilities Manager/Supervisor present. the complaint was directed at

maintenance staff because of their computer game playing, during College work hours, of which several custodians witnessed on numerous different occasions. In Nov. of 1995 another formal complaint was made and the custodial staff was informed that the maint. staff was given a verbal warning about this practice.

Relief sought: We believe that the discipline administered was not adequate since the maintenance staff had been witnessed playing the aforementioned games for more than a year (with the Facilities Manager/Supervisor present). Administer a discipline action that is in relation to the offense and hold a formal investigation into the matter.

. . .

On 10-3-97, the District replied to the Complainant's response to the District's motions to dismiss, in parts pertinent to Case 63, as follows:

Case 63 - The Computer Games Case

The Complainant's response provides no evidence that would refute the defenses set forth in the College's Motion to Dismiss. The Complainant merely contends that he made known the actual date of the alleged violation during a telephone conference. This response is, well, non-responsive. Whether or not we knew of the actual date of the alleged violation does not answer the question of whether the alleged violation occurred outside of the one year statute of limitations.

The exhibits that the Complainant attached to his response do, however, answer this question. Specifically, Exhibit No. 2 (the amended grievance form) confirms that the facts giving rise to the alleged violation became known in November of 1995.

In a separate decision issued today, the Examiner has dismissed the Case 67 complaint on the grounds that, as clarified regarding the date of the evaluation issued to Respondent, that complaint was untimely filed. Dec. No. 28598-A (Gratz, 12/97).

DISCUSSION

Respondent District seeks dismissal of the amended Case 63 complaint without a hearing. "Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief." E.G., UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (HOORNSTRA WITH FINAL

AUTHORITY FOR WERC, 12/77), AT 3.

The pleadings, arguments and record developed to date present the following issues for determination under the above standard in this matter: Complainant's violation of collective bargaining agreement claim; Complainant's 7-8-97 motion to amend the Case 63 complaint to add claims relating to 1996 evaluation/assessments (including the timeliness of any such claims allowed to be added); and the timeliness of the Complainant's independent Sec. 111.70(3)(a)1, Stats., interference allegation, as amended.

Alleged Violation of Sec. 111.70(3)(a)5, Stats.

The Case 63 complaint as initially filed includes an allegation that the District's conduct alleged in that complaint violated Sec. 111.70(3)(a)5, Stats. That Section makes it "a prohibited practice for a municipal employer individually or in concert with

others . . .to violate any collective bargaining agreement . . . . " It is undisputed that BTC/PTC notified him on or about 7-19-96 that it would not submit the Complainant's 3-4-96 grievance to arbitration; that the grievance procedure in the applicable collective bargaining agreement is, by its terms, the exclusive agreed-upon method for resolving disputes about the meaning and application of the agreement; and that Complainant does not claim either that BTC/PTC had failed to fairly represent him regarding the grievance or that the District had prevented the grievance from being arbitrated.

On those undisputed facts, the Examiner has declined to exercise the Commission's jurisdiction concerning (and has therefore dismissed) the Sec. 111.70(3)(a)5, Stats., allegation in the complaint, based on the Commission's well-established case law to the effect that the Commission does not exercise its contract enforcement jurisdiction where the grievance has been resolved pursuant to an exclusive grievance procedure, absent an allegation either of union failure to fairly represent or of employer repudiation of the grievance procedure. SEE, E.G., GREEN BAY SCHOOL DISTRICT, DEC. NO. 16753-A, B (WERC 12/79); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 15825-B,C (WERC, 6/79); AND OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/79). "The rationale for this policy is to give full effect to the parties' agreed-upon procedures for resolving contractual disputes." MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 28562-B (CROWLEY, 12/95) AT 8.

7-8-97 Motion to Amend Complaint and Related Timeliness Issues

By his 7-8-97 motion to amend the Complaint, Complainant seeks to add the allegations noted above concerning certain criticisms included in the evaluation/assessment issued to him on what he now agrees was "June 11, 1996" (rather than "July 11, 1996" as he originally alleged in the 7-8-97 motion to amend), and concerning the absence of such criticisms from the evaluation/assessment of a fellow employe.

The Commission Rules in ch. ERC 12.02(5)(a), WIS. ADM. CODE, provide Complainant with a broad right to amend his complaint at any time prior to the issuance of a final order by the Examiner. It reads,

> Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

It has been noted, for example that the above-quoted rule does not require a complainant to show good cause for its amendment as a respondent would be required to do if it desired to amend its answer under what is now ch. ERC 12.03(5) WIS. ADM. CODE. SEE, WAUTOMA JT. SCHOOL DISTRICT, DEC. NO. 15220-A, (7/77, MALAMUD). While it may be that a motion to amend might properly be denied if it were shown to be prejudicial to the Respondent's rights, Id., granting Complainant's 7-8-97 motion will not be prejudicial to Respondent.

The District argues that its rights would be prejudiced by the proposed amendment if Complainant Benzing were thereby allowed to pursue a complaint of which the District was not given notice until more than one year after the acts or occurrences constituting the alleged violation. However, while granting the motion to amend, the Examiner finds it appropriate to measure the timeliness of the allegations thereby added to the complaint from the date the Complainant first filed those allegations in this matter, i.e., 7-8-97, when the motion to amend was received by the Examiner. SEE, CITY OF STEVENS POINT, DEC. NO. 26525-A (JONES, 2/92) ("Prior Commission decisions have held that when an amendment to a complaint raises a new cause of action, the statute of limitations runs from the date of the amendment; not the date of the original complaint. ID AT 28.") citing CESA #4, DEC. NO. 13100-E (YAFFE, 12/77, AFF'D, -G (WERC, 5/79) and FREDRICKSON V. KABAT, 264 WIS. 545, 548 (1953)(in the case of an amended pleading, a "new cause of action" refers, among other things, to "new facts out of which liability arises.").

The only acts constituting a prohibited practice that are alleged in the 7-8-97 amendments are those relating to Complainant's receipt of his evaluation on 6-11-96. He had reason to know the contents of that evaluation when he signed it on 6-11-97, and he also had reason to know as of that date of the nature and extent of the grievances and any complaints that he had filed prior to that date. Because the 7-8-97 allegations regarding the District's comparative treatment of a fellow employe do not, in and of themselves, constitute a prohibited practice, the more recent but unspecified date when Complainant asserts that he first learned of those facts would not begin the running of a statute of limitations relevant to any of the 7-8-97 amendment allegations. For those reasons, all of the 7-8-97 amendment allegations are time-barred by the one-year statute of limitations contained in Sec.

111.07(14). (The Examiner's rationale in this regard is materially the same as that set forth in detail in the DISCUSSION section of the Case 67 memorandum issued today as Dec. No. 28598-A).

Accordingly, the Complainant's 7-8-97 motion to amend has been granted, but all of the prohibited practice allegations contained therein have been dismissed because they were filed after the one-year statute of limitations had run with respect to them.

Respondent's Motion to Dismiss the Remainder of the Case 63 Complaint

The remaining prohibited practice alleged in the amended Case 63 complaint is the Complainant's independent Sec. 111.70(3)(a)1, Stats., Respondent District seeks pre-hearing dismissal of that remaining prohibited practice allegation on the grounds that that claim is also time-barred by the applicable one-year statute of limitations set forth in Sec. 111.07(14), Stats.

That Section reads, "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." It has been strictly construed by the Commission and by reviewing Courts in the sense that a complaint filed 366 days after the act complained of was dismissed as untimely. CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), AFF'D, DEC. NO. 79-CV-3327 (CIRCT DANE, 6/80).

In determining when the statute begins to run, the Commission has applied what it has characterized as "our general holdings that the statute of limitations begins to run once a complainant has knowledge of the act alleged to violate the Statute. [citations omitted]." STATE OF WISCONSIN, DEC. NO. 26676-B AT 6 (WERC, 11/91). However, in that same decision, the Commission distinguished/reaffirmed its decision in [JOHNSON V. AFSCME COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90)] in which it had rejected the complainant's contentions that she was not obligated to file her complaint within one year of the act alleged (February and March 1982 Union notifications that it decided not to arbitrate her grievance) because she did not discover the allegedly arbitrary nature of that act until 1984. STATE OF WISCONSIN, Dec. No. 26676-B, SUPRA, at 7.

In the instant case -- viewing the facts in the light most favorable to the Complainant -- it is undisputed that Complainant was aware more than one year prior to his 3-3-97 filing of the instant complaint that the District had imposed the harsher discipline on custodians than on maintenance employes alleged in the amended complaint. For example, the complaint as amended by Complainant on 8-5-96, alleges both that Complainant and other custodians complained to Borremans in Amundson's presence "In November of 1995" that the Maintenance staff with Amundson's knowledge and sometime participation had been playing computer games during their non-break working hours; and that the Complainant and other custodians were informed "At a following meeting, on or around January 1996,"

that the maintenance personnel were given a verbal warning as discipline for playing computer games during scheduled non-break work hours. The grievance list submitted by Complainant also establishes that Complainant had filed eight grievances during the period from the beginning of 1993 through 6-5-95, of which Complainant can reasonably be presumed to have been aware on or around January of 1996, as well. Thus, Grievant knew or had reason to know "on or

around January of 1996" of the facts on which he has based his independent Sec. 111.70(3)(a)1, Stats., claim relating to harsher discipline of custodians than of maintenance employes because of custodians' grievance processing activities. That remaining claim is therefore also time-barred by the Sec. 111.07(14), Stats., statute of limitations.

Complainant's arguments to the contrary are not persuasive. Neither the Complainant's correction and clarification of dates during the 7-10-97 pre-hearing telephone conference, nor the contents of the documents Complainant attached to his 9-18-97 response, nor the contents of the complaint as initially filed and as subsequently amended, alters the undisputed fact that Complainant had reason to know all of the facts regarding the disparate discipline allegation in the amended Case 63 complaint "on or around January of 1996," which would be approximately 14 months prior to Complainant's initial filing of the Case 63 complaint on 3-3-97.

Neither the pendency of Complainant's efforts to obtain relief from the disparate discipline through informal communications prior to his March 4, 1996 filing of grievance 96-02 nor the pendency of that from 3-4-96 through 7-19-96 has the effect of tolling or delaying the running of the statute of limitations as regards Complainant's allegation that the same alleged conduct constituted an independent violation of Sec. 111.70(3)(a)1, Stats. SEE GENERALLY, RIB LAKE SCHOOL DISTRICT, DEC. NO. 6797-A (ENGMANN, 11/91), AFF'D BY OPERATION OF LAW -B (WERC, 1992); AND WILMOT JT. SCHOOL DISTRICT NO. 9, DEC. NO. 21092-A (WERC, 10/84).

The Examiner has therefore concluded that under no interpretation of the facts alleged in the Case 63 amended complaint would the Complainant be entitled to relief as regards his independent Sec. 111.70(3)(a)1, Stats., disparate discipline claim.

CONCLUSION

For the foregoing reasons, the Examiner has granted the District's pre-hearing motion to dismiss the Case 63 amended complaint in its entirety.

Dated at Shorewood, Wisconsin this 16th day of December, 1997.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

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